
LONGITUDINAL EMPLOYER–HOUSEHOLD DYNAMICS

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Employment that is not covered by state unemployment insurance laws

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EMPLOYMENT THAT IS NOT COVERED BY STATE UNEMPLOYMENT INSURANCE LAWS

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CHAPTER 1

INTRODUCTION

OVERVIEW

The Census Bureau Longitudinal Employer-Household Dynamics (LEHD) program is approaching full national coverage:

- Forty-two States and the District of Columbia currently participate in a voluntary Local Employment Dynamics (LED) partnership managed within the overall LEHD program.¹
- Thirty-eight LED partner States have posted Quarterly Workforce Indicator (QWI) information at QWI Online <http://lehd.did.census.gov/led/datatools/qwiapp.html>.
- Seventeen of the LED partner States have data available for viewing at On The Map (<http://lehdmap.did.census.gov>), also managed within the LEHD program.

Spreading awareness of Web-based and other authorized availability of LED partnership data² is building a library³ of local and State studies⁴ of labor market dynamics⁵ issues.

¹ The remaining non-partner States are Alaska, Connecticut, Massachusetts, Nebraska, New Hampshire, New York, Ohio and South Dakota.

² Each State controls access to its LED QWI information, including what appears on the Web at QWI Online. The LEHD management team is not authorized to decide whether State QWI information will be released to any person or organization other than the State signatory to the LEHD-State memorandum of understanding or her designee. Inquiries about access to off-line State QWI information should be directed to the appropriate State employment security agency or its counterpart.

³ See <http://lehd.did.census.gov/led/library/library.html> to begin.

⁴ See <http://lehd.did.census.gov/led/datatools/caseExample.html> for documents that have been submitted to the LEHD program by local and State users of program data. Also see http://www.ubalt.edu/jfi/meets/products/portfolio_detail.htm, which is a March 2006 portfolio of documents based on LED QWI data, prepared by the Market-responsive Education and Employment Training System (MEETS) project conducted by The Jacob France Institute, University of Baltimore, and sponsored by the Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor.

⁵ David W. Stevens (2002), *Labor Market Dynamics: One Component of an Integrated System of Labor Market Information*, Washington, DC: Workforce Information Council c/o Bureau of Labor Statistics

(<http://www.workforceinfocouncil.org/documents/LaborMarketDynamicsConceptPaper.doc>).

provides a non-technical definition of the labor market dynamics concept. Definitive coverage is available in Clair Brown, John Haltiwanger and Julia Lane (2006), *Economic Turbulence: Is a Volatile Economy Good for America?*, Chicago, IL: University of Chicago Press, Appendix A: The Data, pp. 129-141.

A basic goal of the LED partnership and QWI Online capability is to post quarterly estimates of worker hire and separation and net job flow and job gain counts⁶. This updated *Technical Paper* focuses on some of the indicators posted at QWI Online (<http://lehd.did.census.gov/led/datatools/qwiapp.html>). Eight of twenty-six indicators are posted at QWI Online.

Newcomers to QWI Online can click on a State of interest and scroll down to see a 'for more information' hot-link in the lower left corner of the screen. This will take you to http://lehd.did.census.gov/led/gdocs/Metadata4_QWI.htm, where this updated *Technical Paper* and other useful information sources are referenced.

The first paragraph at the QWI Online hot-link 'for more information' includes the following sentences:

Employment totals from the QWI are not exactly comparable with those from other sources. Generally, coverage and definitions differ between the QWI and data about establishments from administrative records (e.g., the Quarterly Census of Employment and Wages or QCEW⁷), and about workers from surveys (e.g., the decennial census, the American Community Survey, and the Current Population Survey or CPS⁸.)

LED QWI Online is a final delivery-of-information step that concludes a series of conceptual, administrative, data processing and quality control steps needed to transform employment information received from States into QWI statistics. This updated *Technical Paper* steps back to the initial State collection of data stage of this process.

⁶ Those that have no prior familiarity with the LED partnership and QWI series should be cautious when deciding what indicator(s) to select for a defined use. The QWI terminology has changed from time-to-time as the QWI Online capability transitioned from initial design through beta-testing to full operational release. The word 'hire' is used here because it is a familiar term. Those who go to http://lehd.did.census.gov/led/library/techpapers/Brookings_QWI.pdf, where 26 QWI labels and technical definitions appear, will not find an indicator labeled 'hires'. Instead, five related QWI labels appear—Hires-All (also called 'Accessions'); Hires-New; Hires-Rehires (also called 'Recalls'); Hires-All Flow Into Full-Quarter Employment (also called 'Hires-all stable jobs'); and Hires-New Hires to Full-Quarter Status (also called "New stable jobs"). Simplicity and clarity of communication often fail to align. Misalignment can result in unknown and unfortunate consequences. This *Technical Paper* attempts to strike a balance between simplicity and what users of QWI Online should know about employment that is not covered by State unemployment insurance laws.

⁷ See <http://www.bls.gov/qcew/home.htm>.

⁸ For decennial census detail see <http://www.census.gov/main/www/glossary.html>. For American Community Survey detail see <http://www.census.gov/acs/www/>. For Current Population Survey detail see <http://www.census.gov/cps/>.

ORGANIZATION OF THIS UPDATED *TECHNICAL PAPER*

This chapter continues with a brief comparison of two perspectives on employment coverage in State unemployment insurance (UI) laws.

Chapter 2 introduces facets of State UI laws that should be understood by anyone considering use of LED QWI Online in applied research studies.

Chapter 3 turns to illustrative statutory language found in current State UI laws as a way to sensitize readers to the sometimes complex legal nuances of coverage definitions. Hot-links to useful Federal and State documents are included.

Chapter 4 addresses the non-coverage topic, which cannot be fully illuminated by reference to the State UI laws because non-coverage is an open-ended residual—including all employment circumstances that are not covered in a particular State UI law at a specified time.

Chapter 5 updates an essential topic from the 2002 *Technical Paper*—the growing importance of self-employment and independent contractor employment that are not mutually exclusive and can include some limited liability company (LLC) employment.

TWO PERSPECTIVES ON COVERAGE

The *BLS Handbook of Methods*⁹ describes state Quarterly Census of Employment and Wages (QCEW) reporting coverage:

UI coverage is broad and basically comparable from State to State. In 1994, UI and UCFE [unemployment compensation for federal employees] covered over 112 million jobs, or over 96 percent of total wage and salary civilian jobs. Covered workers received \$3.0 trillion in pay, or 92.5 percent of the wage and salary component of national income.

⁹ *BLS Handbook of Methods* (1997 Edition), Chapter 5: Employment and Wages Covered by Unemployment Insurance, available at http://www.bls.gov/opub/hom/homch5_b.htm, is a lucid introduction to this administrative record data source. The *Handbook* is being updated chapter by chapter. Chapter 5 has not been updated.

The 1997 *Handbook* statement that “UI coverage is broad and basically comparable from State to State” is tempered by a statistic from the February 2005 Current Population Survey (CPS).¹⁰

In February of [2005], there were 10.3 million people working as independent contractors, accounting for 7.4 percent of the employed. The proportion of the total employed who were independent contractors increased from 6.4 percent in February 2001.

The proportion of the total employed defined as independent contractors increased by 15.6 percent between February 2001 and February 2005. There is a four-way relationship among:

- Employment covered by a State UI law.
- Total wage and salary employment in a State.
- Independent contractor employment in a State.
- Self-employment in a State.

Chapter 5 of this updated *Technical Paper* returns to the four-way relationship described in the dot-points above. Understanding of these dot-point definitions is an important prerequisite for accurate interpretation of the LED QWI Online data.

A balanced understanding of employment that is covered by a State UI law and employment that is not covered by this statute is required to prepare an informed response to end-user clients wanting a short answer to a question about a QWI estimate. Chapter 2 begins to assemble the concepts needed to achieve this balanced understanding.

¹⁰ *MLR: The Editor's Desk* (TED), July 29, 2005, “Independent contractors in 2005,” Washington, DC: Bureau of Labor Statistics, U.S. Department of Labor (<http://stats.bls.gov/opub/ted/2005/jul/wk4/art05.htm>). Also see: Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements, February 2005 Technical Note*, 5 pp., July 27, 2005, available at <http://stats.bls.gov/news.release/conemp.tn.htm>.

CHAPTER 2

STATE UI LAW BASICS

OVERVIEW

This chapter begins with brief excerpts from a detailed *Chronology of Federal Unemployment Compensation Laws*.¹¹ This helps in two ways to set the stage for later coverage of State UI law provisions:

1. The Federal-State relationship in the passage and administration of UI laws is clarified.
2. The episodic nature of Federal additions to and exclusions from coverage illustrates the visible change-of-law result of invisible behind-the-scenes attempts by interest groups to raise or lower the proportion of covered employment.

The chapter then moves on to:

- Limited State UI agency interest in employment that is not defined as covered.
- Non-coverage versus other reasons for unreported employment information.

SELECTIONS FROM THE FEDERAL UI LAW CHRONOLOGY¹²

The *Social Security Act* (P.L. 74-271, August 14, 1935) defines the skeletal components of a Federal-State system of unemployment insurance (UI). One provision established at the outset is important for understanding today's State coverage mix—a State is allowed a credit against the Federal unemployment tax (FUTA) for employer UI taxes paid under a State law that meets Federal law requirements. When I or others assert that employment coverage is defined by State UI law only, an unstated corollary is that the Federal government retains fiscal leverage over State coverage decisions.

¹¹ U.S. Department of Labor (2006), *Chronology of Federal Unemployment Compensation Laws*, Washington, DC: Employment and Training Administration, Office of Workforce Security, 82 pp.; available at <http://www.workforcesecurity.doleta.gov/unemploy/pdf/chronfedlaws.pdf> (last updated June 15, 2006.)

¹² The Division of Legislation, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor deserves credit for preparation of the full chronology. The excerpts chosen for presentation here are illustrative only. Other Federal laws covered in the full chronology include additional changes in defined coverage. Any errors of translation or interpretation are my responsibility alone.

The *Railroad Unemployment Insurance Act* (P.L. 75-722, June 25, 1938) establishes an independent Federal UI program for the railroad industry. The definition of 'the railroad industry' and implications for employment covered under State UI laws are discussed later in this *Technical Paper*.

The *Social Security Act Amendments of 1939* (P.L. 76-379, August 10, 1939) define new exclusions from FUTA tax liability, including newsboys under 18, student nurses and interns in a hospital, insurance agents or solicitors on commission only, domestic service in a college club or fraternity, casual labor not in the employer's trade or business, and students employed in a school where they are enrolled if they earn \$45 or less in a calendar quarter. The 1939 SSA Amendments also extend coverage to Federal instrumentalities not wholly owned by the Federal government and instrumentalities not wholly owned by State and local governments.

P.L. 79-291, December 29, 1945, excludes service performed for an international organization from FUTA coverage.

P.L. 79-719, August 10, 1946, extends coverage to maritime service, so a State can cover the crew of an American vessel if the operating office is within the State, and excludes from coverage services performed by a fisherman except for commercial halibut or salmon fishing or on a boat of more than 10 net tons.

P.L. 80-492, April 20, 1948, excludes from coverage services performed by a news agent.

P.L. 80-642, June 14, 1948, amended FUTA to limit the term 'employee' to an employee under the common law rule of 'master-servant' relationship, retroactive to 1939, which resulted in the withdrawal from Federal coverage of a half-million people including outside salesmen.

The timing and content of these Congressional actions is relevant here because it shows how coverage exclusions and additions grew incrementally over a decade. A Supreme Court decision required the June 1948 limited definition of 'employee' for FUTA coverage, which has grown in importance in recent years as the definition of 'independent contractor' has been refined in law and administrative enforcement practices.

P.L. 83-767, September 1, 1954, extends coverage effective January 1, 1956, to employers of four or more workers in 20 weeks of a calendar year. Previously, coverage was limited to employers of eight or more workers.

The *Employment Security Amendments of 1970* (P.L. 92-373, August 10, 1970) extend coverage to employers with one or more employees performing service in 20 weeks in a calendar year or a quarterly payroll of \$1,500.

The *Unemployment Compensation Amendments of 1976* (P.L. 94-566, October 20, 1976) extend coverage to:

- Agricultural labor for employers with 10 or more workers in 20 weeks or who paid \$20,000 or more in cash wages in any calendar quarter.
- Household workers of employers who paid \$1,000 or more in any calendar quarter for such services.
- State and local governments with certain minor exceptions.
- Employees of nonprofit elementary and secondary schools.

These extensions illustrate employment status categories that are important in some sub-State areas, but negligible in others. The 'household workers' category anticipates later treatment in this chapter of a distinction between coverage and employer reporting compliance.

The *Balanced Budget Act of 1997* (P.L. 105-33, August 5, 1997) permits States to exclude from coverage services performed for an elementary or secondary school that is operated primarily for religious purposes (coverage that was previously required.)

The *Consolidated Appropriations Act, 2001* (P.L. 106-554, December 21, 2000) amended FUTA to treat Indian tribal government entities (and subdivisions or subsidiaries including business enterprises wholly owned by the tribe) similar to State and local governments. This means that effective on the date of enactment services performed in the employ of tribes are with specified exceptions required to be covered under State UI law (coverage that previously was optional.)¹³

This section uses a few highlights from 70 years of Federal UI law to alert intermediate- and end-users of LED QWI Online information to the importance of State UI law definitions of employment coverage as an unseen determinant of indicator values. The next section explains why this updated *Technical Paper* was thought to be necessary.

¹³ End-users of LED QWI Online State or sub-State indicators that might be affected by employment for what may be wholly owned tribal businesses are encouraged to contact the State employment security agency or counterpart to determine how tribal business enterprise employment is treated.

LIMITED STATE INTEREST IN EMPLOYMENT THAT IS NOT COVERED

Intermediate- and end-users of LED QWI Online indicators cannot turn to a State UI law to find a definition of non-covered employment. A State UI law defines exceptions from coverage only when there has been a reason for doing so, usually a necessity to amend State UI law triggered by a prior change in the FUTA, or a State legislative response to interest group advocacy.

Each State UI law includes employment coverage and exception from coverage language that reflects the unique history of interest group dynamics in the State. Employers may have a financial interest in limited coverage because this lowers their State UI tax liability. Workers who are or think they may be vulnerable to involuntary interruption of or termination from employment seek an inclusive definition of covered employment, and try to defeat attempts to except currently covered employment. But for a State UI agency non-coverage is an undefined residual of all employment that is not defined in the State UI law as covered.

Managers of State UI programs have little motivation to be interested in employment that is not defined as covered in the State UI law. The State UI agency's first and foremost responsibility is to ensure accurate reporting of covered employment. Accurate reporting of covered employment is a starting point for calculating employer UI tax liability. Some State UI agency interest in a particular category of non-covered employment might emerge in advocacy for broadening the definition of covered employment for an equity or fiscal reason.

My advice to users of LED QWI Online indicators is: Do not ask a State UI agency for types of employment circumstances that are not included in the QWI indicator statistics. Never ask what occupations or industries are not covered by a State UI law—neither, by itself, is a criterion for defining employment as covered or not covered.

NON-COVERAGE VERSUS EMPLOYER FAILURE TO REPORT

Employer failure to accurately report covered employment, whether intentional or not, jeopardizes the integrity of LED QWI Online indicator values. Intermediate- and end-users of LED QWI Online should be aware of the sources and magnitude of these reporting glitches, but this is not a State UI law definition of coverage issue. Assume that a State UI law defines an employer as covered and required to report on all workers that satisfy the legal definition of 'covered employee' under the State UI law. This employer may fail to report on any of these employees all the time until the failure is discovered and corrected, perhaps retroactively, but more likely from the time of discovery or subsequent administrative adjudication forward. Or, the employer may report some, but not all of the covered employees, doing so either consistently or intermittently.

Another phenomenon in employer reporting under State UI law arises from the frequency and timing of transition from a nonemployer business establishment to an employer business establishment¹⁴, business mergers and acquisitions, opening and closing of subordinate establishments within a larger enterprise, and moving entire groups of employees to a different legal status that affects their own reporting obligation—such as redefinition of workers from ‘employee’ to ‘independent contractor’ or from ‘employee’ to legal and financial control by a staffing agent or Professional Employer Organization (PEO).

What should be remembered from the litany of possibilities described in the previous two paragraphs is that anomalies in LED QWI Online indicator trend data, or differences between an LED QWI Online indicator trend and another source of assumed-to-be-similar data, can surface for different reasons or combinations of reasons.

It is unproductive to describe any source of information as ‘wrong’ (or ‘right’). Data are what they are. If the starting point and subsequent processing steps are transparent the boundaries of correct use can be defined.

SUMMARY

The fundamental lessons in this chapter are:

- The definition of covered employment in State UI laws is not static, although changes are usually infrequent and minor in impact.
- Interstate differences in the definition of covered employment in State UI law are minor overall because the FUTA serves as a force toward uniformity of definition through fiscal incentive.

Attention turns next in Chapter 3 to examples of State UI law coverage language and to a national overview of State UI law coverage mandates.

¹⁴ Steven J. Davis, John Haltiwanger, Ron S. Jarmin, C.J. Krizan, Javier Miranda, Alfred Nucci and Kristin Sandusky (2006), *Measuring the Dynamics of Young and Small Businesses: Integrating the Employer and Nonemployer Universes*, Center for Economic Studies, Discussion Paper CES-06-04, Suitland, MD: U.S. Bureau of the Census, 38 pp., available at http://www.ces.census.gov/index.php/ces/1.00/cespapers?down_key=101744.

CHAPTER 3

EXAMPLES OF STATE UI LAW LANGUAGE

OVERVIEW

Intermediate- and end-users of LED QWI Online need to be exposed at least once to nuances of State UI law—not to remember the specifics, but rather to gain respect for the complexity of the laws. URL's for the definition of exceptions to covered employment in nine State UI laws illustrate the basic point.

- California Unemployment Insurance Code.¹⁵
- Florida Statutes, Title XXXI, Chapter 443.036.¹⁶
- Illinois Compiled Statutes, Employment, Unemployment Insurance Act, 820 ILCS 405 Sections 201-247.¹⁷
- Maryland, Code of Maryland Annotated Regulations, Title 9, Subtitle 32.¹⁸
- New Jersey 43:21-19(D), pp. 90-98.¹⁹
- New York, Title 5, Section 511.²⁰
- Pennsylvania, Unemployment Insurance Law, Article One, Section 4(l).²¹
- Texas Government Code, Title 4, Subtitle A, Chapter 201, Subchapter D.²²
- Virginia, Code of Virginia 60.2-219.²³

¹⁵ <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=uic&group=00001-01000&file=629-657>.

¹⁶ http://www.flsenate.gov/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0443/SEC1216.HTM&Title=->2006->Ch0443->Section%201216#0443.1216.

¹⁷ <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2434&ChapAct=820%26nbsp%3BILCS%26nbsp%3B405%2F&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Unemployment+Insurance+Act%2E>.

¹⁸ <http://www.dsd.state.md.us/comar/09/09.32.01.02.htm>.

¹⁹ <http://www.state.nj.us/labor/ui/pdf/UI.pdf>.

²⁰ <http://www.labor.state.ny.us/ui/dande/title2.shtm#511>.

²¹ <http://www.dli.state.pa.us/landi/CWP/view.asp?a=185&Q=213727#4>.

²² <http://tlo2.tlc.state.tx.us/statutes/docs/la/content/htm/la.004.00.000201.00.htm>.

²³ <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+60.2-219>.

SELECTED FUTA EXCEPTIONS FROM COVERED EMPLOYMENT

I noted on page 8 that Federal UI legislation molds but does not control State UI laws. Examples of defined Federal exceptions to employment coverage illustrate this point.

The Federal fiscal hammer is the criteria that determine eligibility for a credit against the FUTA tax. States are required to enact conforming legislation, or face a loss of employer eligibility to claim this UI tax credit.

Some Federal statutory exceptions to covered employment are defined on pages 6 and 7 of chapter 2 in this *Technical Paper*. Here, conforming and other examples of State coverage exceptions are provided.

Service in the employ of an immediate relative

The FUTA exempts from coverage service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother. The conforming language in Florida Statutes, Title XXXI, Chapter 443.036(21)(n)(4) updates the Federal exemption from coverage language to recognize the frequency of remarriage:

Service performed by an individual in the employ of his or her son, daughter, or spouse, including step relationships, and service performed by a child, or stepchild, under the age of 21 in the employ of his or her father or mother, or stepfather or stepmother.

State and local government employment

Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing, is exempt from FUTA tax liability "to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301."

The States, in turn, have defined most services performed in the employ of a State, or a political subdivision thereof, or an instrumentality of any one or more of these, as covered employment for State UI tax purposes. However, certain services remain excepted from a particular State definition of covered employment.

Service performed for certain designated categories of organization

The FUTA excepts from coverage service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) that is exempt from income tax under section 501(a). The Unemployment Insurance Law of Maryland, 8-208, is typical of how the States have treated religious, charitable, and educational institutions for State UI tax purposes:

(a) Except as otherwise provided in this subtitle, employment is covered employment if the employment is: (1) performed for a charitable, educational, religious, or other organization; and (2) excluded from the definition of 'employment' in the Federal Unemployment Tax Act solely by 3306(c)(8) of the Act.

(b) Exception--Church or religious organization. Employment is not covered employment if the employment is performed for: (1) a church or an association or convention of churches; or (2) an organization that is: (i) operated primarily for religious purposes; and (ii) controlled, operated, principally supported, or supervised by a church or an association or convention of churches.

(c) Same--Minister or member of religious order. Employment is not covered employment if the employment is performed by: (1) a commissioned, licensed, or ordained minister of a church in the exercise of the ministry; or (2) a member of a religious order in the exercise of duties required by the order.

(d) Same--Tax exempt organizations. During any calendar quarter in which the compensation is less than \$50, the employment is not covered employment if it is performed for an organization that is exempt from income tax under [applicable IRS codes].

So, while the FUTA, Section 3306(c)(8), excepts religious, charitable, educational or other organizations that are exempt from Federal income taxes, Maryland law excepts only employment performed for a church or an association or convention of churches. Religious schools are not excepted because they have been ruled to be operated primarily for other than religious purposes. Other State laws examined differ from the Maryland language, but the basic effect on coverage of religious, charitable and educational organizations is similar.

Railroad employment²⁴

Service performed by an individual as a railroad employee or employee representative is defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351), which parallels the FUTA. The employment covered in each Act is mutually exclusive of the other.

Section 351 of the Railroad Unemployment Insurance Act states that, except when used in amending the provisions of other Acts:

(a) The term 'employer' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of such employer. Provided, however, that the term 'employer' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

The term 'employer' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions.

²⁴ After reading this sub-section covering exclusion of railroad employment from FUTA liability, intermediate- and end-users of LED QWI Online that are concerned about the impact of this exclusion on LED QWI Online indicator values in their State or sub-State jurisdiction are encouraged to contact the State UI agency to find out how the current State UI law treats railroad 'employers' as this legal term is defined on this page and continuing onto page 14.

The term 'employer' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term 'carrier' means a railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49.

(c) The term 'company' means corporations, associations, and joint-stock companies.

(d) The term 'employee' (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative.

Student and student spouse employment defined as financial aid

The FUTA excepts from coverage:

(A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) or under section 521, if the remuneration for such services is less than \$50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised.

The full definition of this FUTA exception from covered employment is long. The essence of the definition is that employment of a student or a student's spouse that is considered to be financial aid allowing the student to attend a school, college, or university is excepted from coverage, as is employment that is required as part of a regular work-study curriculum.

Employment by a foreign government or an international organization

The FUTA excepts coverage of service performed in the employ of a foreign government (including service as a consular or other officer or employee or a non-diplomatic representative) and service performed in the employ of an instrumentality wholly owned by a foreign government.²⁵

²⁵ This FUTA exception from coverage can be important in selected U.S. locations, such as the United Nations and related foreign government employment in New York City, and embassy and consulate employment in the District of Columbia and some other cities across the U.S.

Employment in selected allied health professions

The FUTA excepts coverage of service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school. The school must be chartered or approved pursuant to State law. Service performed by an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law is also excepted from FUTA coverage.

Employment in the commercial fish, shellfish and related sectors

The FUTA excepts from coverage service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except service performed in connection with the catching or taking of salmon or halibut for commercial purposes and service performed on or in connection with a vessel of more than 10 net tons.

The previous paragraph illustrates why care must be exercised in reading the FUTA and related State UI laws. Here, exceptions to a stated FUTA exception from coverage are defined—those engaged in catching fish other than salmon and halibut, and in vessels weighing 10 net tons or less, are not covered, but those engaged in catching salmon or halibut, and those on vessels weighing more than 10 net tons, are covered.

The specific commercial activities that are described in this FUTA exception from coverage paragraph can have an important impact on LED QWI Online indicator values in some sub-State areas. Examples include commercial shrimping in the Gulf of Mexico, kelp harvesting along the California coast, and pond raising of catfish in a number of southern States.

Employment of nonresident alien persons

The FUTA excepts from coverage service performed by a nonresident alien individual for the period s/he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), or (M) of section 101(a)(15) of the Immigration and Nationality Act, as amended.

The Immigration and Nationality Act, Section 101(a)(15), states that the term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens:

(F) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study.

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States...for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting.

(M) an alien having a residence in a foreign country which has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution.

Subparagraphs (F) and (M) do not permit a nonimmigrant alien to work, so except for speculation about illegal employment these are not pertinent here. However, subparagraph (J) defines temporary teaching, instructing or lecturing, conducting research, and consulting services performed by nonimmigrant aliens, which are exempted from the FUTA definition of covered employment in 3306(c)(20) above.

Up to this point, this section has presented selected exceptions from covered employment defined in the FUTA. Attention turns next to examples of conforming and other State exceptions from covered employment. Each example is chosen to highlight the diversity of exceptions that appear in State UI laws.

SELECTED EXAMPLES OF STATE EXCEPTIONS TO COVERAGE

California

643. "Employment" does not include service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative).

644.5. "Employment" does not include services performed in the employ of an international organization.

650. "Employment" does not include services performed as a real estate, mineral, oil and gas, or cemetery broker or as a real estate, cemetery or direct sales salesperson, or a yacht broker or salesman, by an individual if all of the following conditions are met:

(a) The individual is licensed under the provisions of Chapter 19 (commencing with Section 9600) of Division 3 of, or Part 1 (commencing with Section 10000) of Division 4 of, the Business and Professions Code, Article 2 (commencing with Section 700) of Chapter 5 of Division 3 of the Harbors and Navigation Code, or is engaged in the trade or business of primarily inperson demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment.

(b) Substantially all of the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual.

(c) The services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes.

656. "Employment" does not include professional services performed by a consultant working as an independent contractor.

For the purpose of this section, there shall be a rebuttable presumption that services provided by an individual engaged in work requiring specialized knowledge and skills attained through completion of recognized courses of instruction or experience are rendered as an independent contractor. These services shall be limited to those provided by attorneys, physicians, dentists, engineers, architects, accountants, chiropractors, and the various types of physical, chemical, natural, and biological scientists. Professional services shall not include services generally provided by persons who do not have a degree from a four-year institution of higher learning relating to the specialized knowledge and skills of the professional service being provided.

For the purposes of this section, the rebuttable presumption shall not apply to an individual who enters into a contract agreement with the recipient of the professional services which establishes an employer-employee relationship. However, the existence of a contract between a nonprofit, licensed, primary care clinic, as defined in subdivision (a) of Section 1204 of the Health and Safety Code, and a health care practitioner who is licensed as a physician and surgeon, osteopathic physician and surgeon, podiatrist, optometrist, chiropractor, or psychologist shall not constitute an employer-employee relationship if the contract stipulates that the professional services rendered to the clinic are by an independent contractor, not an employee. Independent contractors who conform to the provisions of this section or primary care clinics that contract with these individuals or organizations shall not be liable for any payments that may be required under an employer-employee relationship pursuant to this code.

Florida

443.1216 Employment.--Employment, as defined in s. [443.036](#), is subject to this chapter under the following conditions:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee. However, whenever a client, as defined in s. [443.036](#)(18), which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers are considered employees of the employee leasing company. An employee leasing company may lease corporate officers of the client to the client and other workers to the client, except as prohibited by regulations of the Internal Revenue Service. Employees of an employee leasing company must be reported under the employee leasing company's tax identification number and contribution rate for work performed for the employee leasing company.

(13) The following are exempt from coverage under this chapter:

(c) Service performed by an individual engaged in, or as an officer or member of the crew of a vessel engaged in, the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including service performed by an individual as an ordinary incident to engaging in those activities, **except** [my emphasis]:

1. Service performed in connection with the catching or taking of salmon or halibut for commercial purposes.

(r) Service performed by an individual for a person as a barber, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission.

Illinois

(820 ILCS 405/211.3) (from Ch. 48, par. 321.3)

Sec. 211.3. For the purpose of Section 211.2, the term "employment" shall not include services performed—A. In the employ of (1) a church or convention or association of churches, or (2) an organization or school which is not an institution of higher education, which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

Maryland

8-206(a). Work is not covered employment when performed by a licensed barber or licensed cosmetologist who leases a chair or booth from a holder of a barbershop permit, a beauty salon permit, or an owner-manager permit who operates a barbershop or beauty salon, if [criteria omitted here].

8-206(e). Work is not covered employment when performed by a taxicab driver who uses a taxicab or taxicab equipment of a taxicab business that is carried on by the holder of a taxicab permit if [criteria omitted here].

Taxicab driver is a particularly good example of sub-State differences in the importance of a particular exemption from covered employment. This exception may be of little importance Statewide, but of substantial interest in one or more cities in a State.

New Jersey

43:21-19. Definitions

As used in this chapter (R.S.43-21-1 et seq.), unless the context clearly requires otherwise:

(i)(1) "Employment" means:

(7) Provided that such services are also exempt under the Federal Unemployment Tax Act, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition

for a tax offset credit against the tax imposed by the Federal Unemployment Tax Act, as amended, the term "employment" shall not include:

(J) Service performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation of such agents for such services is wholly on a commission basis.

(M) Service performed for or on behalf of the owner or operator of any theatre, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a "name brand," entertainer, vaudeville artist, actor, actress, singer or other entertainer.

New York

TITLE 2 DEFINITIONS

Sec. 511. Employment. 1. General definition. "Employment" means (a) any service under any contract of employment for hire, express or implied, written, or oral and (b) any service by a person for an employer

10. Employment under the federal railroad unemployment insurance act. The term "employment" does not include employment subject to the federal railroad unemployment insurance act.

Pennsylvania

ARTICLE I PRELIMINARY PROVISIONS

(l) (1) "Employment" means all personal service performed for remuneration by an individual under any contract of hire, express or implied, written or oral, including service in interstate commerce, and service as an officer of a corporation.

(4) The word "employment" shall not include —

(20) Services performed as a direct seller. (A) The term "direct seller" means any person (i) engaged in the trade or business of selling or soliciting the sale of consumer products to any buyer on a buy-sell basis or a deposit-commission basis, or any similar basis which the United States Secretary of Treasury or his delegate prescribes by regulations for resale by the buyer or any other person in the home or otherwise than in a permanent retail establishment, or (ii) engaged in the trade or business of selling or soliciting the sale of consumer products in the home or otherwise than in a permanent retail establishment.

Texas

201.077. In this subtitle, 'employment' does not include service performed for a private for-profit person by an individual as a landman if: (1) the individual is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or negotiating business agreements that provide for the exploration for or development of minerals; (2) substantially all remuneration, paid in cash or otherwise, for the performance of the service is directly related to the completion by the individual of the specific, contracted-for tasks, rather than to the number of hours worked by the individual; and (3) the service performed by the individual is performed under a written contract between the individual and the person for whom the service is performed that provides that the individual is to be treated as an independent contractor and not as an employee with respect to the service provided under the contract.

Virginia

§ [60.2-219](#). Services not included in term "employment".

The term "employment" shall not include:

15. Service performed by an individual for an employing unit as an agent in the wholesale distribution and sale of gasoline and other petroleum products, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

21. Service performed after July 1, 1984, by an individual as a taxicab driver, or as a driver of an executive sedan as defined in § [46.2-2000](#), provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

22. Services performed by an individual as a "contract carrier courier driver" provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

25. Services performed by an individual as a cosmetologist or as a barber provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act;

26. Services performed by a licensed clinical social worker as defined in § [54.1-3700](#), licensed psychologist as defined in § [54.1-3600](#), licensed professional counselor as defined in § [54.1-3500](#), licensed psychiatrist, or licensed marriage and family therapist as defined in § [54.1-3500](#), if such individual:

a. Operates under a contract specifying that the individual is free from control or direction over the performance of such services;

- b. Is licensed in the Commonwealth to perform independent clinical services;
- c. Is compensated solely by way of fees charged for services rendered by such individual; and
- d. Has a valid business license issued by the locality in which such individual performs such services.

THE IMPORTANCE OF STATE UI LAW EXCEPTIONS FROM COVERED EMPLOYMENT

This section has presented and commented on excerpts from the FUTA, the Railroad Unemployment Insurance Act and nine State UI laws. The intent has been to alert intermediate- and end-users of LED QWI Online to the diversity of exceptions to employment coverage.

Recall the *BLS Handbook of Methods* statement that "UI coverage is broad and basically comparable from State to State." This is an accurate statement. Its message should be heeded when deciding whether and how to use LED QWI Online data. LED QWI Online indicators represent broad and deep coverage of wage and salary employment in a State.

The metaphorical glass is much more than half full. Potential intermediate- and end-users of LED QWI Online should not draw an erroneous conclusion from this chapter that State UI law coverage exceptions, when summed, distort the accuracy of many LED QWI Online indicators; they do not.

The correct lesson to take away from this chapter is that more attention to non-coverage is warranted the smaller the geopolitical jurisdiction defined in LED QWI Online indicator use.

Attention turns next, in chapter 4, to Web-accessible documents that offer unofficial²⁶ but current and relevant State-specific information about coverage.

²⁶ This disclaimer is necessary because each State UI law is the only official statement of coverage definitions. Hot-links to State UI statutes are available at <http://research.lawyers.com/State-Unemployment-Insurance-Websites.html>.

CHAPTER 4

REFERENCE DOCUMENTS

COMPARISON OF STATE UNEMPLOYMENT LAWS

The U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, Division of Legislation publishes an annual *Comparison of State Unemployment Laws*.²⁷ The introductory paragraphs of the chapter titled 'COVERAGE' are pertinent here:

This chapter will provide information about the variations among states with respect to coverage: which employers are liable for UI contributions and which workers accrue UI benefit rights.

When examining coverage, there is one overarching issue: are the services performed by a worker covered? To make that determination, the following questions must be answered:

- Were the services performed in an employer-employee relationship?
- Were the services performed for an employer?
- Were the services performed in employment?
- Were wages paid for the services?

If the answer to all of the above is “yes,” then the services are covered by UI law.

This document makes an important point that has not been mentioned in chapters 1 through 3 of this updated *Technical Paper*: “Most states, however, permit voluntary election of coverage by employers for excluded workers.” Such voluntary election of coverage by employers should be expected to be limited to special circumstances, and thus of minimal overall importance to intermediate- and end-users of LED QWI Online. However, this voluntary election right in some States should remind us that it is often unwise to assert with certainty that excluded categories of workers are not covered—never say never.

²⁷ The most recent edition is described as reflecting “the status of state laws enacted as of January 1, 2005.” The document is available at <http://www.workforcesecurity.doleta.gov/unemploy/ui-law-compar/2005/comparison2005.asp>.

The *Comparison of State Unemployment Laws* includes a clear statement of the distinction between an ‘employer’ and an ‘employing unit’—“An employer is an employing unit that meets the specific requirements of UI law (hence, an employer is covered).”²⁸

The *Comparison of State Unemployment Laws* also includes a clear State-specific statement about agricultural labor coverage. This has been one of the least well understood coverage issues; one that is important to some intermediate- and end-users of LED QWI Online in some States. The basics stated in the *Comparison* document are: “When the UI program began [in 1935], all agricultural labor was excluded from the definition of employment regardless of the size of the agricultural employer...Amendments made in 1970 to the FUTA narrowed the definition of agricultural labor, effectively extending coverage to some marginal agricultural activities. The 1976 [FUTA] amendments added the current dollar/employment thresholds that resulted in coverage of services performed on large farms.”²⁹

CHANGES IN STATE UNEMPLOYMENT INSURANCE LEGISLATION

For those intermediate- and end-users of LED QWI Online not wanting to immerse themselves in the full detail found in the *Comparison of State Unemployment Laws*, or wanting only an update after a one-time reading of the *Comparison* document, an annual update prepared by the Division of Legislation staff is published in the January issue of the *Monthly Labor Review*.³⁰

SELF-EMPLOYMENT

The *Comparison of State Unemployment Laws* states the following about self-employment:

Employment, for purposes of UI coverage, is employment of workers who work for others for wages; it does not include self-employment. Although the protection of the federal old-age, survivors, and disability insurance program has been extended to most of the self-employed, protection under the UI program is not feasible, largely because of the difficulty of determining whether in a given week a self-employed worker is unemployed.

²⁸ Davis *et al.*, *loc cit*, distinguish between an employer business unit and a nonemployer business unit. Details are provided in Chapter 5 of this updated *Technical Paper*.

²⁹ See <http://research.lawyers.com/State-Unemployment-Insurance-Websites.html> for the official state-specific definition of agricultural labor coverage for State(s) of interest.

³⁰ The most recent article is Loryn Lancaster, “Changes in State unemployment insurance legislation in 2005,” *Monthly Labor Review*, January 2006, pp. 30-37; available at <http://www.bls.gov/opub/mlr/2006/01/art2full.pdf>. Responding to my request, Ms. Lancaster sent two more recent updates as e-mail attachments—*Report on State Legislation, Report No. 1* (June 2006), 3 pp.; and *Significant Provisions of State Unemployment Insurance Laws, July 2006*, 7 pp.

Chapter 1, page 4, of this *Technical Paper* makes the point that there is a four-way relationship among:

- Employment covered by a State UI law.
- Total wage and salary employment in a State.
- Independent contractor employment in a State.
- Self-employment in a State.³¹

The final chapter concentrates on this issue from an independent contractor perspective. I quoted February 2005 Current Population Survey Supplement statistics in chapter 1, estimating that independent contractor employment in the U.S. increased by 15.6 percent over four years, from 6.4 percent of the employed in February 2001 to 7.4 percent—10.3 million people—in February 2005. I consider this to be the least understood exclusion from State UI law coverage for most intermediate- and end-users of LED QWI Online indicators.

³¹ Again, Davis *et al.*, *loc cit*, describes ongoing work at the Bureau of the Census to develop an Integrated Longitudinal Business Database (ILBD) that enables researchers to study the dynamics of nonemployer business units that sometimes transit to become employer business units.

CHAPTER 5

INDEPENDENT CONTRACTORS³²

The relevance of independent contractors that are excepted from covered employment in State UI law was introduced in chapter 1 of this updated *Technical Paper*. The 'Contingent and Alternative Employment Arrangements' Supplement to the February 2005 Current Population Survey identified an estimated 10.3 million independent contractors who are not defined as covered employment in State unemployment insurance laws.

A June 2001 NetCompliance, Inc. press release³³ heightens the urgency of being alert to the possible effect of independent contractor employment dynamics on worker accession and separation flow estimates:

The IRS acknowledged that corporate downsizing has lead to an explosion of displaced workers becoming business consultants or contractors...But the agency is concerned that companies are hiring back these very same workers—some with a minimal break in company service—in order to lower their costs in payroll and employee benefits.

DEFINITIONS OF INDEPENDENT CONTRACTOR

The de Silva *et al.* study of independent contractor employment issues cited in footnote 32 reviewed each of the 50 State definitions of employee and independent contractor, concluding:

There are no universal rules or ways to apply each state's definition of employee to specific situations because unemployment insurance violations are within the state realm, not the federal realm.

In the absence of clearly defined standards for employee status and employer liability, administrative agency officials, administrative law judges, and the state courts must settle disputes. Ultimately, the state determines which individuals are employees and which are independent contractors.

³² See: Lalith de Silva, Adrian Millett, Dominic Rotondi and William Sullivan, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., February 2000, 99 pp.+ appendices (released as U.S. Department of Labor *Occasional Paper 2000-5*, Office of Employment Security, Employment and Training Administration.)

³³ NetCompliance, Inc., "Corporate Downsizing Causes IRS to Look at Role of Business Consultants," June 22, 2001.

States determine who is an employee and who is an independent contractor using one or more of three methods.

A Common Law Test

The Unemployment Insurance Law of Maryland, 8-201, states:

Except as otherwise provided in this subtitle, employment is covered employment if: (1) regardless of whether the employment is based on the common law relation of master and servant, the employment is performed: (i) for wages; or (ii) under a contract of hire that is written or express or implied; and (2) the employment is performed in accordance with 8-202 of this subtitle.

The reviser's note for this section of the annotated Unemployment Insurance Law of Maryland states:

Services performed are presumed to be employment under this title, regardless of whether or not there is a common law relationship of master and servant between the employer and employee, until it is shown by the employer, who has the burden of so showing, that a person rendering such service comes within the exceptions enumerated. The burden is upon the employer to show that the parties concerned fall within the tests enumerated.

The California Unemployment Insurance Code, 606.5(a), states:

Whether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship, except as provided in subdivisions (b) and (c).

Subdivisions (b) and (c) of the California Unemployment Insurance Code, 606.5, describe criteria for defining an employment relationship involving a temporary services employer and a leasing employer.³⁴

³⁴ See: Susan N. Houseman, Arne L. Kalleberg and George A. Erickcek (2001), *The Role of Temporary Help Employment in Tight Labor Markets*, Staff Working Paper No. 01-73, Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 45 pp. While not an employment coverage issue *per se*, the same cost containment forces that motivate the employer behavior described in this Staff Working Paper influence employer use of independent contractors.

Florida Statutes, Title XXXI, 443.036(21)(a)(1)(b), states:

Any individual, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. However, when a company, hereafter referred to as 'client', which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers shall be considered employees of the employee leasing company.

These employment circumstances are not a coverage issue. However, intermediate- and end-users of LED QWI Online indicators should be aware that a common employee cost-containment motive affects management decisions about use of independent contractors, temporary service employers and leasing employers. Sequential, or concurrent, use of a mix of these employer-employee relationships will affect whether, and how, worker transition events are recorded.

The ABC Test

The ABC refers to three criteria, each of which must be met to except services provided from covered employment.

1. Criterion A is that the person performing the service must be free from contractual and *de facto* control of the performance of the service by the recipient of such service.
2. Criterion B is that the service is either outside the normal business activities of the recipient of the services or performed off the premises of the recipient of the services.
3. Criterion C is that the service provided is customarily engaged in as an independent trade, occupation, profession, or business by the person performing the service.

The IRS Test

IRS Revenue Ruling 87-41 describes a 20 common law factors test that is used to determine if a person is an employee or an independent contractor.³⁵

³⁵ The IRS 20 common law factors can be found at <http://www.uimn.org/tax/20factors.htm>.

The Texas Government Code, Section 201.041, states:

In this subtitle, 'employment' means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

STATE LAW DYNAMICS

De Silva *et al.* conclude:

Contributing to the differences in approach to [independent contractor] classification is the fact that the criteria and their relative importance are constantly under review by the courts. The laws in the individual states dealing with UI vary and, in the main, reflect the states' social and economic philosophy. These laws are then shaped and clarified by the judicial process established in that state. The end result can highlight the perceived differences, reinforcing the critics' claim of inconsistency. It should be pointed out that although the state legislatures are empowered to bring the differing [independent contractor] criteria into uniformity, there is no evidence in the recent past that this is their inclination.

This serves as another warning that intermediate- and end-users of LED QWI Online must remain alert to future changes in State UI laws, as these might affect the coverage of State administrative records.

REGULATION INCENTIVES

Another potentially important consideration for intermediate- and end-users of LED QWI Online is an employment size class issue.³⁶ By hiring independent contractors, an employer's employment size class can be held below the threshold number of employees that triggers a need to comply with state and federal regulations.

³⁶ The *Technical Note* to the July 27, 2005, *News Release* reports that "87 percent of independent contractors were identified as self-employed in the main questionnaire, while 13 percent were identified as wage and salary workers. Conversely, about half of the self-employed were identified as independent contractors." This *Technical Note* is available at <http://www.bls.gov/news.release/conemp.tn.htm>.

AFFIRMATIVE ACTION AND OTHER RECRUITMENT COST INCENTIVES

Some employers are alleged to designate selected new hires as independent contractors with an intention to then convert some to employee status based on observed performance criteria. This behavior will affect the timing and incidence of accession and separation estimates calculated from State UI wage records.

WORKERS' COMPENSATION BENEFIT INCENTIVES

Employers of some providers of high-risk services, such as roofers, construction workers and bicycle couriers, are alleged to engage these service providers as independent contractors, but then convert them to employees if they are injured on the job, so they can collect Workers' Compensation benefits. This practice, too, could affect the timing and incidence of worker accession and separation estimates.

TAX BURDEN INCENTIVES

Some employers are alleged to give work to employees to take home. Instead of paying overtime for take-home work, the employer categorizes the employee as an independent contractor and pays by the piece for work done in the home. Family members 'help' and never show up on company books as employees or independent contractors.

The California Unemployment Insurance Code, Section 606, states:

Each individual employed to perform or to assist in performing the work of any individual employed by an employing unit shall be deemed to be employed by that employing unit for all the purposes of this division, whether or not he was hired or paid directly by the employing unit if the employing unit had actual or constructive knowledge of the work.

The Illinois Compiled Statutes, 820 ILCS 405/213, states:

Each individual performing services for, or assisting in performing the work of, any person in the employment of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Act, whether such services were procured or were paid for directly by such employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work.

The California and Illinois definitions clearly define take-home work as covered employment. This means that the employer practice of assigning take-home work, described above, is an accuracy of reporting, or compliance, issue, not a coverage issue. From an LED QWI Online user's perspective this distinction may not matter—worker accession and separation events occur but do not appear in the State UI wage records relied upon to calculate worker flow estimates.

THE CONCENTRATION OF INDEPENDENT CONTRACTOR USE

De Silva *et al.* asked State employment security agency audit department staff members in 14 cooperating States to list the industries where they frequently encounter misclassification of independent contractors. California, Florida, Maryland and Texas audit staff responses are included in the published findings.

- California—Services, landscaping, construction, manufacturing.
- Florida—Trucking, construction, home health.
- Maryland—Construction, cleaning services, home health, trucking, catering, cable and carpet installers, hygienists referred to dentists, secretaries to attorneys.
- Texas—Eating and drinking establishments, trucking, warehousing, oil & gas industry, real estate, farm labor, non-residential building construction, special trade contractors, employment agencies, and general automotive repair shops.

Today's legal, regulatory and economic environment is motivating a growing number of employers to define some service providers as independent contractors. However, employer opportunities to legally define some service providers as independent contractors are limited and concentrated in sectors that can be identified and isolated in the estimation of worker accession and separation flows.

AN ESTIMATE OF INDEPENDENT CONTRACTOR EMPLOYMENT

Up to this point, the basic theme has been that employment coverage in State employment security agency administrative records is inclusive overall. Certain exceptions remain of concern as a threat to the integrity of LED QWI Online worker accession and separation estimates.

Having made the case that a problem exists, attention turns to the calculation of an estimate of independent contractor employment in three industry sectors (Construction, Retail Trade, and Other Services³⁷) and five States (CA, FL, IL, MD and TX).

Current Population Survey (CPS) data

The July 27, 2005, Bureau of Labor Statistics *News Release*, which includes findings from the Contingent and Alternative Employment Arrangements supplement to the February 2005 Current Population Survey, distributes an estimated 10.3 million independent contractors using 2002 North American Industry Classification System (NAICS) two-digit codes.

Forty-one percent of the estimated 10.3 million independent contractors in February 2005 were affiliated with three industries—22 percent in Construction (NAICS 23), 9 percent in Retail Trade (NAICS 44-45), and 10 percent in Other Services (NAICS 81). These percentages were used to estimate State-specific independent contractor employment in these industries.

³⁷ The 2002 version of this *Technical Paper* included *all services* (1987 Standard Industrial Classification two-digit codes 70-89). This update uses 2002 Census Bureau Current Population Survey (CPS) industry classification codes derived from 2002 North American Industry Classification System (NAICS) codes—see Mary Bowler, Randy E. Ilg, Stephen Miller, Ed Robison, and Anne Polivka, *Revisions to the Current Population Survey Effective in January 2003*, available at <http://www.bls.gov/cps/rvcps03.pdf>. “Other Services,” NAICS two-digit code 81, was chosen as a substitute for the previous “Services,” SIC two-digit codes 70-89, in part because Davis *et al.*, *loc cit*, provide new comparative information about employers and nonemployers. Davis *et al.* estimate that there were 5.4 million employer business units with employees in the U.S. in 2000, and another 15.5 million nonemployer business units without employees. Using the preliminary version of an Integrated Longitudinal Business Database (ILBD) developed by the authors they further estimate that 13.4 million of the 15.5 million nonemployer business units are “person ID units (sole proprietorships with no employees) and 2.1 million are EIN [employer identification number] units (corporations, partnerships and other nonemployer business entities with EINs).” (p. 4). Davis *et al.* continue that “Other Personal Services has the largest number of nonemployer businesses, more than 800 thousand. The highest-revenue industry for nonemployers is Real Estate Agents and Brokers with almost 23 billion dollars.” (p. 5). And, “Nonemployer revenue shares range widely. At the upper end, nonemployers account for more than two-thirds of revenue in Independent Artists, Writers and Performers, and they account for at least thirty percent of revenues in twelve industries.” (p. 5). Finally, Davis *et al.* state that “Another exciting direction for future research is the integration of *employee* data with the ILBD. Using the longitudinal matched employer-employee data from the LEHD program at the Census Bureau, demographic and earnings data for the universe of employees can be integrated with the ILBD files.” (pp. 14-15). The 2002 NAICS code 81 “Other Services” is new, covering private households, repair services and personal services. Illustrative four-digit “Other Services” are: electronic and precision equipment repair and maintenance, personal and household goods repair and maintenance, personal care services (including barbers, beauty salons, diet and weight reducing centers), death care services, drycleaning and laundry services, pet care, photofinishing, and parking lots and garages.

The employment figures found in Table 8 of the July, 2005, Bureau of Labor Statistics *News Release* were used to calculate the industry-specific number of independent contractors included in the overall estimate of 10.3 million independent contractors. The employment figures for independent contractors, on-call workers, temporary help agency workers, workers provided by contract firms, and workers in traditional arrangements were calculated and summed for each of the three industries.

Estimates of Independent contractors as a percentage of each industry-specific summed employment number were derived, using the published *News Release* report that independent contractors composed 12.4 percent of February 2005 Construction employment, 4.6 percent of Retail Trade employment, and 15.5 percent of employment in Other Services.

Current Employment Statistics (CES) survey data

Three additional steps were taken to arrive at State-specific estimates of independent contractor employment in the Construction, Retail Trade, and Other Services industries. Seasonally adjusted³⁸ non-farm 16+ Current Employment Statistics (CES) establishment survey data for February 2005³⁹ for each of the five States were used as the starting point for estimating State-specific independent contractor employment in Construction, Retail Trade, and Other Services.

The Bureau of Labor Statistics reported that 13 percent of self-identified independent contractors had described themselves as wage and salary workers in the main February 2005 Current Population Survey instrument.⁴⁰

³⁸ Seasonally adjusted BLS CES data are not available for the Retail Trade industry in any of the four States or for Maryland Construction employment.

³⁹ Customized State-specific archived CES data are available at <http://data.bls.gov/PDQ/outside.jsp?survey=sm>.

⁴⁰ The *Technical Note* to the July 27, 2005, *News Release* reports that “87 percent of independent contractors were identified as self-employed in the main questionnaire, while 13 percent were identified as wage and salary workers. Conversely, about half of the self-employed were identified as independent contractors.” This July 27, 2005, *Technical Note* is available at <http://www.bls.gov/news.release/conemp.tn.htm>.

This percentage figure was used in a two-step sequence to derive an estimate of the number of independent contractors not included in the State-specific CES estimates of employment in each of the three industries. The result from this series of calculations appears next. I estimate that almost 645,000 independent contractors were employed in the Construction, Retail Trade, and Other Services sectors of the CA, FL, IL, MD and TX economies in February 2005, but not included in the CES employment estimates for these State-specific sectors for the same month.

**AN ESTIMATE OF INDEPENDENT CONTRACTOR EMPLOYMENT
FOR FIVE STATES AND THREE INDUSTRIES (FEBRUARY 2005)**

(000's)

	<u>CA</u>	<u>FL</u>	<u>IL</u>	<u>MD</u>	<u>TX</u>
<u>Construction</u>					
Total Employment	878	555	270	156*	555
Estimate of all IC's	109	69	33	19	69
Wage & Salary IC's	14	9	4	2	9
Omitted IC's	95	60	29	17	60
<u>Retail Trade</u>*					
Total Employment	1,618	965	608	289	1,078
Estimate of all IC's	74	44	28	4	50
Wage & Salary IC's	10	6	4	--	6
Omitted IC's	64	38	24	4	44
<u>Other Services</u>					
Total Employment	506	327	258	118	348
Estimate of all IC's	78	51	40	18	54
Wage & Salary IC's	10	7	5	2	7
Omitted IC's	68	44	35	16	47

Sources: Current Population Survey Supplement, February 2005
Current Employment Survey, February 2005
<http://data.bls.gov/PDQ/outside.jsp?survey=sm>.

*--not seasonally adjusted in BLS CES customized State-specific tabulations.

The 645,000 independent contractors that are assumed to be omitted from the CES employment estimates for these States and industries is a conservative, and perhaps fragile, estimate of workers that do not appear in the State UI wage records underlying the LED QWI Online indicators.

The independent contractor employment estimate, and the separation of independent contractor employment into wage and salary versus self-employed components, is based on the Current Population Survey of households. The State-specific industry employment data that were then used are collected through the Current Employment Statistics survey of establishments.

A respondent in the Current Population Survey may be classified as a wage and salary employee based on answers given to questions in the main questionnaire, but then classified as an independent contractor based on answers given to questions in the supplement to the main questionnaire. Thirteen percent of the respondents in the February 2005 survey were classified in this way.

Each Current Population Survey respondent can have no more than one type of employment affiliation in a reference month. A respondent's answers have no predictable relationship to how a Current Employment Statistics respondent (an employer) might categorize them. Furthermore, the CES counts jobs, not people.

Meanwhile, a Current Population Survey respondent's employer, or employers, may, or may not treat them as covered for State UI reporting purposes. Again, there is no predictable relationship between CES reporting and whether a worker is treated as covered for State unemployment insurance reporting purposes.

This section provides a quantitative sense of the importance of independent contractor employment that is excepted from coverage in the State UI wage records that are being used to estimate worker accession and separation flows.

OVERALL CONCLUSION

As the *BLS Handbook of Methods* puts it, employment coverage in State employment security agency administrative records is "broad and basically comparable from state to state." However, exceptions to the statutory definition of covered employment appear in each State UI law. Many of these exceptions are common, but over time interest group dynamics have resulted in additional State-specific exceptions to the definition of covered employment.

More important for infrequent intermediate- and end-users of LED QWI Online indicators, the coverage exceptions defined in a State UI law do not include all excepted employment coverage. Again, the basic rule to follow is that any employment that is not explicitly defined as covered in a State UI law is by exclusion safely defined as not covered. But, remember that employers retain the right in some States to voluntarily report non-covered workers.

The independent contractor issue is another matter—it does have immediate implications for some uses of worker flow estimates. This updated *Technical Paper* does not recommend how to respond to knowing that independent contractors are not included in the State UI wage records that are being used to estimate worker flows.

The State LED partners share an interest with their Census Bureau colleagues in the development of methods to investigate when and how independent contractor accession and separation flows should be calculated. These methods can then be applied, with appropriate refinements, to other employment that is excepted from coverage in State UI wage records.

A caution mentioned earlier is repeated here:

Some, but not all employers are employing units for State UI reporting purposes. Some, but not necessarily all services provided in the employ of an employing unit are defined as covered employment. Individuals providing identical services, but in the employ of different employers, may not be treated the same for reporting purposes.

Finally, the content of this updated *Technical Paper* should protect intermediate- and end-users of LED QWI Online from making a common but avoidable mistake. It is not possible to compile two lists of *occupations*—one describing employment in occupations that are covered by State UI law and another that describes occupations that are not covered by these laws. No occupational descriptor is found in a State UI wage record (except in Alaska.) But, even if such a descriptor was included in a State UI wage record, **occupation is not a stand-alone criterion for determining whether employment is treated as covered by a State unemployment insurance law.**